BEFORE THE KANSAS WORKERS COMPENSATION BOARD

JOHN C. HEWITT	)	
Claimant	)	
v.	)	
	)	Docket Nos. 1,060,111, 1,060,112,
	)	1,060,113 & 1,060,114
STATE OF KANSAS	)	
Respondent	)	
and	)	
	)	
STATE SELF-INSURANCE FUND	)	

ORDER

Respondent requests review of the November 13, 2014, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on March 10, 2015.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Nathan Burghart, of Lawrence, Kansas, appeared for respondent and the State Self-Insurance Fund (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award. At oral argument, the parties stipulated the application for Board review was filed only in Docket Nos. 1,060,111 and 1,060,113 and that only those claims should be reviewed by the Board.

ISSUES

In Docket No. 1,060,111 (date of accident July 7, 2006), the ALJ found claimant served timely written claim and timely filed an application for hearing. Permanent partial disability (PPD) benefits were awarded based on a 5 percent whole body permanent functional impairment.

In Docket No. 1,060,113, the ALJ found claimant sustained personal injury by accident arising out of and in the course of his employment on May 20, 2010. The ALJ

also found claimant timely filed an application for hearing and served a timely written claim. Compensation was awarded based on a finding of permanent total disability.

The issues in Docket No. 1,060,111 are:

1. Did claimant serve a timely written claim?

2. Did claimant file a timely application for hearing?

3. What is the nature and extent of claimant's disability?

The issues in Docket No. 1,060,113 are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment?

2. Did claimant serve a timely written claim?

3. Did claimant file a timely application for hearing?

4. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

At the May 8, 2014, regular hearing, claimant testified he was 52 years old and resided in Council Grove, Kansas. He studied heating and air conditioning at a vocational technical school. Claimant testified he had military experience working on utilities, including equipment repair, heating, cooling, gas and electrical.

Claimant worked for Kansas State University from April 2000 until December 12, 2011. Claimant testified he worked on boilers for a time, then engaged in plumbing, including heating, cooling and working on pumps. He was transferred to the electrical shop briefly, then to the construction shop, which required moving and hauling equipment. Claimant testified all the work he performed for respondent required physical labor. He agreed the work he performed for respondent was in the medium to heavy range. Claimant also worked for respondent on a part-time basis at the football stadium, supervising ticket taking at one of the gates.

On July 7, 2006, claimant injured his lower back when using a pipe wrench to loosen a steam line on a pump. Respondent sent claimant to Mercy West, where he was seen by a physician who prescribed a TENS unit, medication and injections. Claimant testified he continued to use the TENS unit until the present time. Claimant ordered and received supplies for the unit which were provided at respondent's expense. In 2010, claimant

started encountering problems obtaining the supplies, however, there is no evidence respondent ceased providing such supplies, nor is there is there evidence claimant was ever notified such treatment was no longer authorized. No permanent restrictions were imposed regarding the July 7, 2006, event and claimant continued to perform his regular job.

On May 20, 2010, claimant was ripping out carpet, cutting it into smaller sections, rolling it up and carrying it up a flight of stairs to his truck. Claimant testified as he went up and down the stairs he began to have pain in his lower back, with radiating left leg pain and numbness. Claimant asserted his low back was still hurting from the 2006 injury, but he did not experience sharp pain from his back down his leg before the 2010 accident.

Following the May 20, 2010, incident, claimant was again seen at Mercy West. Dr. Hu administered injections in claimant's low back and SI joint providing temporary relief. After a period of light duty and work hardening, Dr. Hu released claimant at maximum medical improvement (MMI) on October 19, 2010. Claimant returned to work for respondent with permanent restrictions. Claimant continued to experience back and leg pain.

Although claimant had been declared by Dr. Hu to have attained MMI, claimant continued to receive authorized treatment, consisting primarily of injections from Dr. Hu, until May 22, 2012.[1]

Claimant has not worked since December 17, 2011. Respondent terminated claimant's employment on December 17, 2012. Claimant testified he is not physically able to work on a full-time basis because of his back and leg pain. Claimant has not applied for jobs and does not believe he could hold a job. Claimant started receiving social security disability benefits effective June 2012.

Claimant testified he cannot pick up anything, bend over, sit too long, or walk too far because his back hurts constantly. According to claimant, he has fallen two or three times because of a stabbing pain from his back down his leg. Claimant takes Flexeril and Percocet for his back and leg pain.

At his attorney's request, claimant saw P. Brent Korpivica, M.D., who is board certified in occupational medicine, on May 3, 2012, and March 25, 2014. On both occasions, Dr. Koprivica took a history, reviewed medical records and conducted a physical examination.

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[1] Koprivica Depo., Ex. 2 at 12.

Dr. Koprivica found the accident of July 7, 2006, was the direct and proximate cause of the low back injury claimant sustained on that date. He also found the accident of May 20, 2010, was the direct cause of the injury to his low back and left leg.

Based on the AMA *Guides*,[2] for the July 7, 2006, low back injury, Dr. Koprivica found claimant sustained a 5 percent whole person permanent impairment of function. For the May 20, 2010, low back and left leg injury, Dr. Koprivica found claimant sustained a 15 percent permanent whole body functional impairment. The doctor also found claimant sustained a 50 percent right lower extremity impairment for the right hip, which converts to a 20 percent impairment to the body as a whole.[3] The ratings of 20 percent and 15 percent to the body combine under the AMA *Guides* to 32 percent to the whole body.

For the May 20, 2010, claim, Dr. Koprivica imposed permanent restrictions to avoid frequent or constant bending at the waist; avoid pushing, pulling or twisting; avoid bending more than occasionally, less than one-third of an 8-hour day; avoid squatting, crawling, kneeling and climbing; avoid captive positioning, with sitting limited to less than an hour and standing and walking to less than 30 minutes; avoid whole body vibration or jarring such as operating heavy equipment or driving over the road commercially; and avoid lifting or carrying more than 50 pounds.

Dr. Koprivica testified claimant is permanently and totally disabled. Dr. Koprivica reviewed a list of work tasks claimant performed in the 15 years prior to his May 2010, accident. In the doctor's opinion, claimant has a 100 percent task loss.

Alexander Bailey, M.D., a board certified orthopedic surgeon, evaluated claimant on May 31, 2012, at respondent's request. Dr. Bailey testified claimant's complaints and x-rays were consistent with multi-focal degenerative osteoarthrosis of the lumbar spine, degenerative disk disease of the lumbar spine, SI joint arthrosis and degenerative joint disease of the right hip.

Dr. Bailey found no causal relationship between claimant's symptoms and any work-related event, condition, exposure or injury. The doctor testified claimant's job activities did not exacerbate or alter the natural progression of his degenerative conditions, but he admitted he saw no records documenting osteoarthritis before 2006.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[3] Claimant's right hip symptoms arose after an accident on December 17, 2011, which was docketed under number 1,060,114. The ALJ found the alleged December 2011 injury was a direct and natural consequence of the May 20, 2010, alleged injury.

Dr. Bailey found no permanent impairment of function related to the 2006 or alleged 2010 accidental injuries. The doctor imposed no permanent restrictions for any work injury. Dr. Bailey would not limit claimant from performing any work tasks.

Pursuant to an order entered by the ALJ, Dr. Edward Prostic performed a neutral medical evaluation on November 19, 2012. Dr. Prostic's report states claimant has symptoms of instability of the left lower extremity, confirmed by a one inch decrease in circumference of the left calf compared to the right, caused by either S1 radiculopathy with peroneal weakness or instability of the ankle itself. The doctor found claimant had symptoms of L5-S1 radiculopathy and osteoarthritis of the right hip contributed to by claimant's accident.

In Dr. Prostic's opinion, claimant is not employable until he has a total right hip arthoplasty. If claimant's radiculopathy continues after a good result from hip surgery, he will need CT myelography to guide surgical decompression of the low back. Dr. Prostic rated claimant's whole body permanent functional impairment at 20 percent. The doctor's rating included the ankle because claimant's left ankle instability likely results from the S1 nerve injury rather than instability of the ankle itself.

In an addendum report, Dr. Prostic imposed restrictions of no work greater than light duty; avoid frequent bending or twisting at the waist and forceful pushing or pulling; avoid captive positioning; and avoid more than minimal use of vibrating equipment.

Vocational consultant Richard L. Thomas interviewed claimant on January 24, 2014, at the request of claimant's counsel. Mr. Thomas prepared a report identifying jobs and work tasks claimant performed in the 15 years before his injuries. Mr. Thomas testified claimant was employable until 2011, but subsequently unemployable. Claimant's previous jobs were unskilled except for plumbing, which is beyond his restrictions.

Mr. Thomas testified claimant is permanently totally disabled based on restrictions from Dr. Koprivica. If claimant had no restrictions, as Dr. Bailey suggests, claimant could return to doing the work he was doing and would not be permanently and totally disabled.

After reviewing Dr. Prostic's restrictions, Mr. Thomas opined claimant could do unskilled work, if anything at all. Mr. Thomas testified considering Dr. Prostic's restrictions, claimant's age, education, training, work experience, transferability of job skills and the location where claimant resides, it would be extremely difficult to place him in a job.

Karen Crist Terrill, a rehabilitation consultant, interviewed claimant at the request of respondent to identify the work tasks claimant performed in the 15 years prior to his injuries and to assess claimant's capability to earn wages.

Based on Dr. Prostic's restrictions, claimant's work history and educational background, Ms. Terrill opined claimant could work as a hand packager or a janitor. Ms. Terrill saw no limitations precluding claimant from working full-time. Ms. Terrill testified claimant could earn from $324.40 to $459.20, working full-time as a hand packager and from $327.60 to $429.20, working full-time as a janitor.

Claimant filed applications for hearing in Docket Nos. 1,060,111 and 1,060,113 on March 23, 2012.

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

K.S.A. 44-501(a)[6] provides in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) provides: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and

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[4] K.S.A. 44-501(a).

[5] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[6] The provisions of the worker compensation act relevant to the issues in these two claims are the same.

circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 44-508(d) provides:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 44-508(e) provides:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way to the stress of the worker's usual labor. It is not essential that the lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown by that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-520a provides in relevant part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-534(b) provides:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

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[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

The Kansas Supreme Court has held that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[8] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[9] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation.

If an employer is on notice that an employee is seeking treatment on the assumption that treatment is authorized by the employer, the employer is under a duty to disabuse the employee of that assumption if the employer expects the 200-day limitation to take effect.[10]

In *Blake v. Hutchinson Manufacturing Co.,* the Kansas Supreme Court stated: "[I]t is well established that 'The furnishing of medical aid to an injured employee constitutes the payment of compensation so that a claim filed within due time of the date when the last medical aid was furnished claimant by respondent was filed in time.'"

An application for hearing, if timely filed, constitutes a written claim for compensation.[11]

K.S.A. 44-510c(a)(2) defines permanent total disability: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The phrase "substantial and gainful employment" is not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*[12] held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

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[8] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[9] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[10] *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973); *see also Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, 642 P.2d 574 (1982).

[11] *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

[12] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

affliction.[13] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[14]

For each of the issues in these matters, the Board finds the following:

Docket No. 1,060,111

1. Claimant timely served written claim. The uncontroverted evidence[15] establishes respondent continued to provide medical treatment to claimant from the date of the July 7, 2006, accidental injury to the present. The treatment consisted of providing claimant with the supplies necessary to operate the TENS unit. The unit was prescribed by an authorized physician and the record does not reveal respondent advised the doctor or claimant that such treatment was no longer authorized.

Respondent's obligation under K.S.A. 44-510h is to provide medical treatment reasonably necessary to cure and relieve the effects of the injury. Such treatment includes, but is not limited to "apparatus." Because respondent continued to provide claimant with supplies for the TENS unit, the time in which written claim must be served has yet to commence.

Respondent relies on *Shields*,[16] which is distinguishable from this claim. Ms. Shields abandoned her medical treatment and respondent was unaware claimant continued to use her TENS unit. In Docket No. 1,060,111, claimant did not abandon his medical treatment and respondent was aware of claimant's continued use of the TENS unit because respondent continued to provide the supplies for the operation of the unit.

Accordingly, claimant's written was timely served.

2. Claimant timely filed an application for hearing. As noted above, respondent continued, until the present, to provide medical treatment for the 2006 injury in the form of

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[13] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp*., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[15] Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive. *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[16] *Shields v. J. E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997).

supplies for claimant's TENS unit. Accordingly, claimant's application for hearing filed on March 23, 2012, is timely under K.S.A. 44-534(b).

3. Regarding the nature and extent of claimant's disability, the Board finds the opinions of Dr. Koprivica more credible than those of Dr. Bailey and the court-ordered physician, Dr. Prostic. The testimony of claimant alone may be sufficient evidence of his physical condition.[17] Dr. Prostic rated claimant's permanent impairment at 20 percent to the body, however, he did not address the extent to which, if any, such impairment was caused by claimant's July 2006 accidental injury. The Board finds persuasive the impairment rating of Dr. Koprivica and accordingly adopts his rating of 5 percent to the whole body.

Docket No. 1,060,113

1. Claimant sustained personal injury by accident arising out of and in the course of his employment on May 20, 2010. He injured his low back and experienced new symptoms of left radicular pain and numbness. The preponderance of the credible evidence establishes the May 2010 accident resulted in increased symptoms and aggravated claimant's low back originally injured in July 2006. Dr. Koprivica and the court-ordered neutral physician, Dr. Prostic, opined claimant sustained an injury as a result of the May 10, 2010, event. Dr. Bailey's finding that claimant sustained no work-related injury is considered, but found to be less than credible because it is inconsistent with the preponderance of the credible evidence in this record.

2. and 3. Because respondent continued to provide authorized medical treatment until May 22, 2012, the filing of claimant's application for hearing and service of written claim on March 23, 2012, were timely.

4. The Board agrees with the ALJ's finding that claimant sustained an aggregate permanent functional impairment as a result of the accidental injury of May 20, 2010, of 32 percent to the body, based on the opinions of Dr. Koprivica. Claimant's impairment encompasses the low back, left lower extremity and right hip.

Although the evidence is in conflict, the Board finds claimant sustained his burden to prove he has been rendered, on account of the May 20, 2010 injury, completely and permanently incapable of engaging in any type of substantial and gainful employment. Claimant is essentially and realistically unemployable. The testimony of claimant, Dr. Koprivica, Richard Thomas and the opinions of Dr. Prostic support a finding of permanent total disability pursuant to K.S.A. 44-510c. The opinions of Dr. Bailey are considered but are found less than credible and unpersuasive because they are at significant variance with

[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

the rest of the medical evidence. Ms. Terrill's opinion that claimant can perform unskilled positions like a janitor and hand packager seems lacking in credibility, given claimant's age, education and training, work history, residual symptoms, permanent restrictions, permanent functional impairment and the relevant open labor market.

CONCLUSIONS

In Docket No. 1,060,111:

1. Claimant serve a timely written claim.

2. Claimant filed a timely application for hearing.

3. Claimant sustained a 5 percent whole body functional impairment as a result of his July 7, 2006, accidental injury.

In Docket No. 1,060,113:

1. Claimant sustained personal injury by accident arising out of and in the course of his employment on May 20, 2010.

2. Claimant serve a timely written claim.

3. Claimant filed a timely application for hearing.

4. As a result of his May 20, 2010, accidental injury, claimant sustained a 32 percent permanent whole body functional impairment and is, on account of this injury, permanently totally disabled from engaging in any type of substantial and gainful employment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated November 13, 2014, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Rebecca Sanders, Administrative Law Judge